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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EDGARDO MARTINEZ and JOSE LUIS HERNANDEZ, Defendants and Appellants.	B189957 (Los Angeles County Super. Ct. No. BA 279452)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Reversed in part with directions and affirmed in part.

Robert Valencia, under appointment by the Court of Appeal, for Defendant and Appellant Edgardo Martinez.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant Jose Luis Hernandez.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Edgardo Martinez and Jose Hernandez of two counts of attempted second-degree robbery (counts 1-2) and two counts of criminal threats (counts 3-4), in all of which each defendant personally used a deadly weapon. (Pen. Code, §§ 664, 211, 212.5, 422, 12022, subd. (b)(1); all further undesignated section references are to the Pen. Code.)[1] (Elio Lopez was the victim in counts 1 and 3 and Ana Rosas was the victim in counts 2 and 4.) In a bifurcated hearing after a jury waiver, the court found that Martinez had one "serious" and "strike" prior felony conviction. (§§ 667, subds. (a)-(i), 1170.12.) The court imposed an aggregate sentence of 11 years, 8 months on Martinez (which included two doubled terms as a second strike) and 4 years on Hernandez, and awarded each defendant 15 percent conduct credits pursuant to section 2933.1.

Defendants appeal. Hernandez contends that (I) insufficient evidence supports his conviction for attempted robbery of Lopez (count 1). He argues that the prosecution tried count 1 on the theory that Lopez had constructive possession of Rosas' purse and that, by trying to take Rosas' purse, Hernandez was guilty of attempting to rob both Rosas and Lopez. According to Hernandez, insufficient evidence supports a conviction on this theory. He argues further, that if we view the prosecution's case as based on Hernandez's demanding money from Lopez, the evidence also is insufficient to support conviction.[2] In addition, if substantial evidence supports only the "purse" theory, Hernandez contends that we must reverse because the record does not disclose that the jury unanimously agreed on that theory. If, however, substantial evidence supports both theories, Hernandez contends that the court erred by failing to give a unanimity

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[1] In addition to the crimes of which they were convicted, Martinez and Hernandez each was charged with two counts of assault with a deadly weapon, one against each of the two victims. The court dismissed one of those charges before trial and the jury acquitted defendants of the other three assaults.

[2] Defendants do not challenge their attempted robbery convictions based on their attempting to take the purse from Rosas (count 2).

instruction sua sponte pursuant to CALJIC No. 17.01 (Spring 2007 ed.) (all further CALJIC references are to the Spring 2007 edition).

Martinez contends that the court abused its discretion by (II) preventing him from cross-examining Lopez about his reports of being victimized in similar attempted robberies; (III) admitting Lopez' jacket into evidence; and (IV) denying his motion, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, to dismiss his prior strike conviction. Both defendants contend that (V) because *attempted* robbery is not a violent felony pursuant to section 667.5, subdivision (c), the court erred in awarding them 15 percent conduct credits pursuant to section 2933.1 rather than 50 percent credits pursuant to section 4019. (The Attorney General concedes this issue.)

We reject contentions I-IV. We agree with contention V, reverse the conduct credits order, and modify the judgment to award defendants 50 percent credits. In all other respects, we affirm the judgment.

FACTS

On the afternoon of February 27, 2005, Lopez and his wife Rosas were walking toward a market near Rosas' home. Martinez and Hernandez, whom the couple did not know, approached them from behind. Hernandez pushed Rosas, grabbed at her purse, and threatened to kill her unless she surrendered it. Rosas stepped behind Lopez for protection, and Lopez told defendants to let Rosas go. Both defendants threatened to kill Lopez, demanded money from both victims,[3] and slashed or jabbed at Lopez with knives or similar weapons. Lopez used one arm to shield Rosas and wrapped his jacket around his other arm to ward off the weapons. Lopez' jacket was slashed during the attack.

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3 During his direct examination, Lopez testified that defendants had threatened to kill him and Rosas, and had demanded money without specifying from whom they demanded it. During Hernandez' cross-examination, this colloquy occurred: "Q [by Hernandez' counsel] When [defendants first] confronted you and you stopped, . . . did you hear one of them say something? [¶] A Both said . . . that I needed to surrender my money or I was going to get killed. [¶] Q And they were speaking to you? [¶] A To both. [¶] Q And you specifically remember them saying, 'give me your money or I'll kill you'? [¶] A Yes, ma'am."

Lopez and Rosas backed toward and eventually entered the market with defendants in pursuit. Lopez used Rosas' cellular telephone to call the police. Hernandez followed the couple inside the store. Lopez hid Rosas in the back of the store, then approached a butcher and asked for help. Hernandez approached Lopez, threatened to kill him, and left the store, walking away with Martinez. The police arrived in 10-15 minutes and interviewed Lopez and Rosas. About 10 minutes later, police took Lopez and Rosas to another location, where they identified defendants as their assailants. Lopez and Rosas repeated those identifications at trial. As described more fully in Discussion section III, Lopez kept his jacket, provided it to authorities months later on request, and at trial identified it as the one involved in the robbery and the visible slash marks as those inflicted during the attack. The court admitted the jacket into evidence over Martinez' objection that an insufficient chain of custody had been maintained. As described more fully in Discussion section II, the court denied defendants' motion to cross-examine Lopez about two other attempted robberies he reported after this incident which occurred in the same general area.

In defense, an investigator testified that Rosas had told her that the defendants did not have any weapons in their hands and did not assault her or Lopez. The butcher testified that no one was chased inside on the day of the incident and that he had never seen Lopez before trial. Hernandez testified that he knew Lopez from having had drinks with him a few times. When he and Martinez encountered the couple on the day in question, Hernandez greeted Lopez, who said he could not talk because he was out with his wife. Hernandez and Martinez followed the couple to the market to buy beer. Hernandez denied touching Rosas or brandishing any weapon. Hernandez went inside, saw Lopez, but left when he learned the market did not sell beer. Hernandez claimed that when police stopped him and Martinez a few minutes later, the only object in his possession was a soda can.

In her opening statement and opening and rebuttal jury arguments, the prosecutor consistently described her case theory regarding the two attempted robberies as both defendants "demand[ing] money" from both victims without further elaboration. The

prosecutor's only specific reference to any particular demand for money came during her rebuttal, when, describing Rosas' statement to the police shortly after the incident, the prosecutor stated, "[Rosas told the police:] The two suspects approached from behind. One of them pushed her in the back and almost caused her to fall to the ground. [¶] They said, 'Give me your wallet' in Spanish. . . ." The prosecutor never argued or suggested that the attempted robbery of Lopez was based on Lopez' constructively or actually possessing Rosas' purse. Moreover, neither Martinez nor Hernandez defended those charges based on any argument relating to Lopez' actual or constructive possession of Rosas' purse.

Although the court instructed the jury generally regarding the elements of attempted robbery pursuant to CALJIC No. 9.40, including that the perpetrators had to attempt to take property from the victim's "possession," none of the parties requested and the court did not give further instructions defining possession.[4]

The jury convicted defendants of two counts of attempted robbery, count 1 as to Lopez and count 2 as to Rosas, and two counts of criminal threats, in all of which the jury also found that each defendant personally used a deadly weapon. The jury acquitted defendants of the three remaining assault counts.

DISCUSSION

I. Sufficient Evidence Supports Hernandez' Conviction of Attempting to Rob Lopez.

Hernandez contends that neither of the two possible theories of his guilt of attempting to rob Lopez (count 1) is supported by sufficient evidence. He argues that the

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4 See CALJIC No. 1.24, which states: "There are two kinds of possession: actual possession and constructive possession. [¶] Actual possession requires that a person knowingly exercise direct physical control over a thing. [¶] Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons. [¶] One person may have possession alone, or two or more persons together may share actual or constructive possession." (Cf. CALJIC No. 9.40.3 regarding a store employee's constructive possession of store merchandise.)

prosecution proceeded exclusively on the theory that defendants' attempt to take Rosas' purse constituted attempted robbery of Lopez. We disagree. The record does not support Hernandez' contention. Rather, the prosecution's exclusive theory was that defendants attempted to rob both victims by demanding money from both of them and that they also tried to take Rosas' purse. Neither the prosecution nor defendants based their cases on the assertion or denial that Lopez possessed Rosas' purse. Defendants' theory was that neither of them committed any crimes, and that Lopez and Rosas either lied or unwittingly exaggerated an innocent encounter into a criminal attack. Moreover, no one requested, and the court did not give, jury instructions defining actual or constructive possession. Without such argument or instructions, no rational jury would have convicted defendants of attempting to rob Lopez based on his actually or constructively possessing Rosas' purse, and nothing in the record suggests that the jury based its verdict on such a theory. Accordingly, we need not discuss whether such theory finds support in the evidence or Hernandez' contention that the court was required to give a unanimity instruction.

Hernandez also contends that insufficient evidence supports his conviction under the theory that he demanded money from Lopez because Lopez' equivocal statement during cross-examination was inconsistent with his testimony on direct examination and was insufficiently credible to support that theory. We disagree.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonable deduce from the evidence. [Citation.] [¶] []Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's

credibility for that of the fact finder. [Citations.]'" (*People* v. *Ochoa* (1993) 6 Cal.4th 1199, 1206, quoting *People v. Jones* (1990) 51 Cal.3d 294, 341.) "The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People* v. *Scott* (1978) 21 Cal.3d 284, 296.)

Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."[5] (*People v. Nguyen* (2000) 24 Cal.4th 756, 759-761.) Contrary to Hernandez' assertion that Lopez' cross-examination testimony was unbelievable because it was inconsistent with his testimony on direct examination, Lopez' cross-examination testimony *was* consistent with his direct examination testimony. On direct examination, Lopez testified that defendants demanded money without specifying from whom. This testimony alone would have justified guilty verdicts against both defendants for attempting to rob Lopez. Then, during cross-examination, Lopez clarified that defendants demanded money from "both" him and Rosas. To the extent the cross-examination was different, it was simply an elaboration of his direct testimony. Nor was Lopez' testimony on cross-examination inherently unbelievable. Nothing to which Lopez testified or which he reported to the police contradicted his testimony that defendants demanded money from him.

II. The Court Properly Exercised its Discretion in Precluding Defendants from Examining Lopez Regarding Two Other Attempted Robberies.

During trial, defendants moved, over the prosecutor's objection, to cross-examine Lopez regarding two later attempted robberies he reported to the police. The court held a hearing outside the jury's presence pursuant to Evidence Code section 402. At the hearing, the parties agreed that Lopez had reported being victimized in two other

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[5] We recognize that our case involves an attempted rather than completed robbery ("[a]n attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission[]" (§ 21a)) , but that distinction is irrelevant for purposes of our analysis.

attempted robberies occurring in the same general area, the first, one day after the instant incident and the second, seven months later. In both instances, the perpetrator accosted Lopez with a knife while demanding money, Lopez resisted, and the perpetrator fled without obtaining any property. Police apprehended both perpetrators after the crimes, and when arrested neither possessed weapons. In the first case, the defendant pleaded guilty to unspecified charges in exchange for a two-year sentence; in the second case, the suspect was awaiting trial on unspecified charges.

Defendants argued that they should be permitted to cross-examine Lopez about these incidents to support their trial theory that no crimes occurred and that Lopez testified falsely in this case. Defendants argued to the trial court, as they do here, that the evidence supported an inference that Lopez exaggerated contacts into crimes and falsely claimed that weapons were used, and that he may have done so again in this case.

The court denied the motion, finding that the other incidents (1) did not undermine Lopez' credibility, in part because Rosas corroborated his account and was not involved in the other events, and in part because they showed only that he lived in a high crime area where he was more likely to be victimized, (2) were otherwise irrelevant, (3) would involve mini-trials of the other incidents, and (4) their probative value was outweighed by their prejudicial effect.

Courts generally have discretion to control the admission of evidence. (*People v. Hall* (1986) 41 Cal.3d 826, 834.) Only relevant evidence is admissible (Evid. Code §§ 350, 351) subject to statutory exceptions including if its probative value is outweighed by its substantial prejudicial effect. (Evid. Code, § 352.) We review a trial court's ruling under Evidence Code section 352 for abuse of discretion. (*People v. Valdez* (2004) 32 Cal.4th 73, 108.)

Evidence that a crime victim falsely reported crimes is relevant to impeach the victim's credibility. (*People v. Franklin* (1995) 25 Cal.App.4th 328, 335.) Where there is no evidence that crime reports are false, however, they are irrelevant. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

Applying these principles to our facts, we conclude that the court properly exercised its discretion in precluding defendants from cross-examining Lopez regarding his reports of subsequent attempted robberies. Defendants offered the evidence to attack Lopez' credibility by suggesting that he falsified or significantly exaggerated his reports of being victimized. Regardless of the theory under which the evidence was offered (impeachment, evidence of custom or habit), the key assumption in defendants' position was that the reports were false. No evidence or offer of proof supported this conclusion.

Even if the evidence was relevant, its probative value, as the court also found, was outweighed by its prejudicial effects. Lopez' account was corroborated by Rosas, who was not involved in the other incidents, and whose credibility would not be affected by the impeachment. Admitting the evidence would have involved a mini-trial of the truth of the other reports, involving undue consumption of time on a collateral matter.

III. The Court Properly Exercised its Discretion in Admitting Lopez's Jacket.

Lopez testified that he wrapped his jacket around one arm and used it to ward off the knife blows from defendants' weapons. During the attack, defendants slashed the jacket with their weapons. Lopez did not tell authorities about the jacket until he testified about it during the preliminary hearing in May 2005. In July, pursuant to a request from a prosecution investigator, a detective contacted Lopez and asked him to bring the jacket to the police station. Lopez complied. Shortly thereafter, the investigator took custody of the jacket, and brought it to trial. At trial, Lopez identified the jacket and the slash marks. He testified that between February and July 2005 he wore the jacket regularly to his work as a house painter, often leaving it in a plastic bag at job sites while working. The court admitted the jacket into evidence over defendants' objection that an inadequate chain of custody had been established to assure that it was the same jacket involved in the incident. The court ruled that any such inadequacy went to the weight, not admissibility, of the jacket.

On appeal, Martinez argues that the five-month gap between the February attack and the prosecution's securing the jacket in July rendered unreliable the inference that it

was the same jacket, because it was not preserved in the same condition as on the day of the attack. The contention lacks merit.

We review the court's decision to admit the jacket for abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167.)

Martinez primarily relies on *People v. Riser* (1956) 47 Cal.2d 566, 580-581,[6] which held that "the party relying on *an expert analysis of demonstrative evidence* must show that it is in fact the evidence found at the scene of the crime, and that *between receipt and analysis* there has been no substitution or tampering [citation] . . . . [¶] The burden on the party offering the evidence is to show . . . that . . . it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight. [Citations.]" The court held that fingerprints collected at the crime scene and left unlocked in a detective's office for four hours before being secured properly were admitted where there was no evidence that anyone tampered with them, could forge fingerprints, or knew the evidence was in the office.

We reject Martinez' assumption that the *Riser* rule applies to Lopez' jacket. The jacket was *physical* evidence, not *demonstrative* evidence requiring *expert analysis*. Lopez testified that the jacket produced at trial was his jacket with which he warded off defendants' knife blows, and identified the cuts visible on the jacket at trial as those inflicted by defendants' weapons. Unlike the situation with blood, fingerprints, DNA, or other demonstrative evidence requiring expert analysis, which cannot be distinguished from other samples unrelated to the case or accurately tested without maintenance of a proper chain of custody, the jacket was a physical object requiring no expert analysis.

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6 Disapproved on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn.2, 648-649, and *People v. Chapman* (1959) 52 Cal.2d 95, 98.

Lopez' testimony provided all the foundation needed to admit the jacket. As the court found, the fact that neither Lopez nor the police secured the jacket for five months after the attacks went to the weight of the evidence, not its admissibility.

IV. The Court Properly Exercised its Discretion in Refusing to Strike Martinez' Prior Conviction.

The court sentenced Martinez to an aggregate term of 11 years and 8 months in prison. The court imposed a base term of 10 years for the count 1 attempted robbery of Lopez, composed of a 2-year middle term, doubled to 4 years as a second strike, an additional year for personal use of a knife, and an additional 5 years for the prior serious felony conviction. On the count 2 attempted robbery of Rosas, the court imposed a consecutive one-year and 8-month term, composed of one-third of the 2-year middle term or 8 months, doubled to 16 months as a second strike, and an additional one-third of the one-year term or 4 months for personally using a knife.

Martinez contends that, pursuant to *Romero*, the court abused its discretion in refusing to dismiss his prior conviction for sentencing purposes. We disagree.

We review the court's decision whether to dismiss strike prior convictions for abuse of discretion. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 530-531.) The court properly exercised its discretion in this case. Martinez contends that the court abused its discretion in using the strike to increase the sentence on both counts rather than striking it for at least one count. We agree that the court had discretion to strike the strike prior conviction as to one or both counts (*People v. Garcia* (1999) 20 Cal.4th 490, 492-493, 496-504) but disagree that the court abused its discretion in refusing to do so. Although Martinez suggests that the balance of sentencing factors required the court to strike the strike as to at least one count, he does not identify any mitigating circumstances supporting this result. Indeed, the record supports the court's decision. As the court noted, these crimes were committed less than two months after Martinez' last conviction, and he was on probation when he committed the current crimes, which were more serious and numerous than his previous crime.

V. The Court Erred in Not Awarding Defendants 50 Percent Conduct Credits.

The parties correctly agree that the court erred by basing defendants' custody credits on section 2933.1 (awarding 15 percent credits) rather than on section 4019 (awarding 50 percent credits). Section 2933.1 applies to "violent felonies" enumerated in section 667.5, subdivision (c), which, although it includes "any robbery" (subdivision (c)(9)), does not include any attempted crime except attempted murder (subdivision (c)(12)). The parties also agree that defendants should have received 186, rather than 56, days of conduct credit. We reverse the order awarding conduct credits, modify the judgment to award each defendant 186 days of conduct credit, and remand for the trial court to prepare an amended order and abstract of judgment and to forward a copy of the amended abstract to the Department of Corrections.

DISPOSITION

The order awarding each defendant 56 days of conduct credit is reversed and the judgment is modified to award each defendant 186 days of conduct credit. The case is remanded to the trial court with directions to prepare an amended order and abstract of judgment so stating, and to forward a copy of the amended abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P.J.

VOGEL, J.